

Under the terms of the Perak Order-in-Council adoption is recognised, and adopted sons are entitled to the same legal rights as legitimate sons. And no man may will away his property from his sons. The property must be divided to a share in the property other than for maintenance and dowry.

On an intestacy in this case therefore, the devolution of any property is not governed by the Distribution Enactment 1929 No. 12/1929, incorporating the English Law on the subject, and should devolve on the two sons.

As to the gift being void for Superstitious purposes, although I relied on a Judgment of Mr. Justice Terrell in Singapore Suit No. 699/1925, *Low Cheng Soon & Others v. Low Chin Piow & Another*,<sup>(1)</sup> which quoted no authorities for this decision, I found that I could not overcome the decision in the case of *Bourne v. Keane*,<sup>(2)</sup> which established that a bequest for masses is not superstitious and is further a charitable purpose. No F.M.S. case, or any other Colony case could be found to declare a bequest of this nature was for a superstitious use.

The case of *Re Yap Kwan Seng*,<sup>(3)</sup> was quoted by me as an authority that the English rule against Perpetuities applied to the F.M.S. in which Mr. Justice Sproule followed the Colony cases of *Yeap Cheah Neo v. Ong Cheng Neo*<sup>(4)</sup> and *Choa Choon Neoh v. Spottiswoode*<sup>(5)</sup> in holding that a bequest of this kind is not a charity.

I argued that the case of *Yeap Cheah Neo v. Ong Cheng Neo*<sup>(4)</sup> and *Choa Choon Neoh v. Spottiswoode*<sup>(5)</sup> distinguished a case of this kind from the case of *Bourne v. Keane*<sup>(2)</sup>, and that a distinction is clearly shown that the bequest is not charitable if the object is limited to the benefit of a particular person or class of persons, but is charitable as in the case of *Bourne v. Keane*<sup>(2)</sup> if the object is not so limited.

There could be no question here that the gift not being for charitable purposes, did offend the rule against perpetuities.

Respondents unrepresented.

**Murray-Aynsley, J.**—In this case the testator left certain shares of his estate to his father's "Chin Shong." The question arises whether this is a good bequest. If not the further question arises as to the destination of the property so bequeathed.

As regards the bequest to the "Chin Shong" we have the authority of certain cases from the Colony and one case from the F.M.S.

In the case of *Re Yap Kwan Seng*,<sup>(3)</sup> Sproule, J. held that a bequest of this type was a perpetuity and that the English Rule against Perpetuities applied to the F.M.S. He followed the Colony cases in holding that a bequest of this kind is not a charity. (*Yeap Cheah Neo v. Ong Cheng Neo*<sup>(4)</sup> and *Choa Choon Neoh v. Spottiswoode*,<sup>(5)</sup>). These cases all avoided declaring that such a purpose was a superstitious use although in the Colony cases *West v. Shuttleworth*,<sup>(6)</sup> was cited in support of the decisions.

Now the fact that *West v. Shuttleworth* has been overruled in *Bourne v. Keane*<sup>(2)</sup> was not cited in the case of in *Re Yap Kwan Seng*<sup>(3)</sup>. The case of *Bourne v. Keane*<sup>(2)</sup> established that a bequest for Masses is not superstitious and further it seems a charitable purpose.

As regards the first point I think it is clear that the Colony cases were not decided on the ground that bequests of this kind were superstitious although in one fairly recent case this additional ground was given in holding such a bequest void. But as regards the question of charitable purpose I think that the local cases are unaffected. In *Choa Choon Neoh v. Spottiswoode*<sup>(5)</sup> an elaborate description was given by Maxwell, C.J. of the ceremonies connected with such a bequest as the present one which may be contrasted with the doctrine of the Mass set out in the judgments in *Bourne v. Keane*<sup>(2)</sup>. I think that a distinction must be drawn between the purpose of the two observances, that one is limited as to its object to the benefit of a particular person, the other is not so limited, and this is the difference between what is not and what is a charitable purpose.

The result is that such a bequest is perfectly good like a bequest for the up-keep of a tombstone provided that the bequest is so drawn that the rule against perpetuities is not infringed, a matter which should not be beyond the ingenuity of local conveyancers.

I gave my decision on the other points orally at the hearing. I do not think that they give rise to any difficulties.

Order accordingly.

[APPELLATE CRIMINAL JURISDICTION]  
MURRAY-AYNSLEY, J.  
October 16, 1939.

DRIS BIN TAIB v. PUBLIC PROSECUTOR.  
[PERAK MAGISTRATE'S CRIMINAL  
APPEAL No. 72 of 1939]

*Road Traffic Enactment, 1937, Sec. 80 (i)—whether driver can be guilty of offence under—"using*

*a vehicle*”—*Criminal Procedure Code, Cap. 6, Sec. 422*  
—*statement made during police investigation—conditions of admissibility in evidence—irregularity.*

The driver of a vehicle as distinct from the owner can be guilty of an offence under Section 80 (i) of the Road Traffic Enactment, 1937.

The admission of a statement made by a witness during a police investigation, a copy of which is not furnished to the accused and which is not proved in any way, is an irregularity which cannot be cured under Section 422 of the Criminal Procedure Code, Cap. 6.

#### MAGISTRATE'S CRIMINAL APPEAL.

*J. A. Thivy* for the Appellant. The driver of a vehicle as distinct from the owner cannot be guilty of an offence under section 80 (i) of the Road Traffic Enactment. He referred to S. 81 (i) and 113 of the Enactment. On reading S. 80 (i) the implication is that only owners of cars can be in a position to cause or permit a motor vehicle to be used as a stage carriage, a contract carriage or a hackney carriage, because that section uses the words “unless he is a holder of a licence.” He submitted that this could only apply to an owner who alone can be a holder of such a licence. Under Section 113 of the Enactment, there are certain presumptions against the accused person. One of the presumptions is that “any person is owner of a vehicle.” It was proved in this case that the accused was only a driver.

It was wrong in law for the learned Magistrate to have admitted in evidence the statement of the prosecution witness alleged to have been made to the Police in the course of investigation when the same was tendered and proved in the manner provided by the Evidence Enactment. He referred to Section 113 of the Criminal Procedure Code. Under Ss. 145 and 115 (c) it is clear that the prosecution ought to have proved the statement alleged to have been made by the witness to the prosecution officer. The method of proving will be:—

- (a) By asking the witness if he made a different statement to the Police,
- (b) The accused should have been furnished with a copy of the statement,
- (c) Calling the particular Police Officer as a witness to prove the recording of the statement.

*T. V. Brodie* for the Public Prosecutor, Respondent.—He admitted that the provisions of the law had been violated in several ways, viz., that the statement was not submitted first to the Court for its ruling as to whether it could be used: that a copy of the state-

ment was not supplied to the accused contrary to Section 113 (i) of Chapter VI and that it had not been formally proved: nor put in cross-examination to the witness contrary to Section 145 Evidence Enactment. He submitted that the fact that the statement had not been proved, amounted merely to the improper admission of evidence which had not led to any substantial injustice and was covered by Section 167 Evidence Enactment, and Section 422 Criminal Procedure Code. He further submitted that non-compliance with the procedure laid down in Section 113 (Cap. 6) as preliminary to using a statement to impeach the credit of a witness was an irregularity of the sort covered by Section 422 (Cap. 6) and not an illegality, the procedure being essentially formal and the disregard thereof neither having been shown to have caused an injustice nor being likely to cause any such injustice and being due to inadvertence and not deliberation.

*Cur. Adv. Vult.*

**Murray-Aynsley, J.**—This case gave rise to two points fit to be considered. One whether the driver of a vehicle as distinct from the owner can be guilty of an offence under Section 80 (i) of the Road Traffic Enactment. I think that it is clear that in the ordinary meaning of the word a driver uses a vehicle. The difficulty is that the section has the words “unless he is the holder of a licence etc.” A driver not an owner would not in any case be the holder of a road service licence, so on a literal construction of the section he would appear to be committing an offence even if he were driving a vehicle on a properly licensed service. Be this as it may where the owner is committing an offence I think the driver is also committing an offence and there is nothing in this contrary to good sense. It is to be noted that Section 82 (2) gives in the case of goods vehicles a definition of “using” which excludes the ordinary case of a driver as distinct from the owner.

There is no corresponding provision in the case of passenger vehicles.

A point of a different kind, a matter of procedure, arising out of Section 113 of the Criminal Procedure Code, the provisions of which were seriously disregarded. That is a statement made by a witness was put in, but a copy was not furnished to the accused, nor was it put to the witness or proved in any way.

It was argued that this was a case within Section 422. In the interpretation of this section there has grown up a distinction between irregularity and illegality which has unfortunately the approval of the highest authorities and it is beyond the wit of man to

draw a clear distinction between the two. I do not think that a matter of this kind can be classed as a mere irregularity in view of decided cases. I think therefore that the conviction must be quashed.

*Appeal allowed. Conviction quashed.*

[APPELLATE CRIMINAL JURISDICTION]

GORDON-SMITH, Ag. J.A.

October 27, 1939.

**PUBLIC PROSECUTOR v. CHIN YOKE.**

[PAHANG MAGISTRATE'S CRIMINAL

APPEAL No. 4 of 1939]

*Road Traffic Enactment, 1937, Ss. 13 (i), 44 (i)—driving a motor cycle without being licensed—taking a motor cycle without owner's consent—proof of absence of licence—onus—Criminal Procedure Code (Cap. 6), S. 173 (f)—summary trials—no prima facie case established—duty of Magistrates.*

In a prosecution for an offence of doing something for which a licence is required under the Road Traffic Enactment it is unnecessary to call a licensing officer to prove the non-issue of the licence. The burden is on the accused to negative the averment of being unlicensed, by producing his licence.

In a summary trial, if the magistrate is satisfied that, if rebutted, the evidence led by the prosecution would warrant the accused's conviction, then a *prima facie* case has been made out against him. In such a case the accused should be called upon to answer the *prima facie* case made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution, the magistrate is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no *prima facie* case has been made out and the accused should not be called on for his defence.

Cases referred to:—

- (1) *Public Prosecutor v. Lee Pak*, (1937) M.L.J. 265.
- (2) *Rex v. Kakelo*, (1923) 2 K.B. 795.

**MAGISTRATE'S CRIMINAL APPEAL.**

The Respondent in this case was charged at the Magistrate's Court, Raub, on the 14th September, 1939, with the following offences—

- (a) Section 13 (1) of the Road Traffic Enactment, 1937 and punishable under section 118 (1) of the said Enactment;
- (b) Section 44 (1) of the Road Traffic Enactment and was acquitted and discharged without being called upon to defend.

Against this decision the Public Prosecutor appealed on the ground that the learned Magistrate

in coming to the conclusion that a *prima facie* case had not been made out against the Respondent was against the weight of evidence having regard to the fact that the Prosecution had, *inter alia*, adduced evidence

- (a) that the Respondent was driving a motor cycle;
- (b) that the Respondent failed to produce his licence when called upon to do so;
- (c) that the motor cycle in question was not the property of the Respondent;
- (d) that the motor cycle was driven by the Respondent without the consent of the owner.

At the hearing of the appeal the learned Judge allowed the appeal and ordered a new trial before another Magistrate.

T. D. Wallace, Assistant Legal Adviser, for Public Prosecutor, cited *Public Prosecutor v. Lee Pak*<sup>(1)</sup>. Respondent in person.

**Gordon-Smith, Ag. J.A.**—This was an appeal by the Public Prosecutor against the decision of the Magistrate in acquitting and discharging the Respondent. The Respondent was charged—

- (a) under Section 13 (i) of the Road Traffic Enactment for driving a motor cycle and not being licensed, and
- (b) under Section 44 (i) of the same Enactment for taking away a motor cycle without the consent of the owner.

After recording the evidence of a Police Sergeant and a Police Constable and also the owner of the motor cycle in question, and after an adjournment, the Magistrate, without calling on the accused for his defence, acquitted and discharged the accused. In his grounds of judgment the learned Magistrate stated that the identification of the rider of the motor cycle was extremely weak, that the licensing officer should have been called to prove the non-issue of a licence to the accused, and that he was of the opinion that no *prima facie* case had been made. He therefore acted under section 173 (f) of the Criminal Procedure Code and acquitted and discharged the accused.

The evidence of the Sergeant (with whom was the Police Constable) was to the effect that he had known the accused for 2½ years and he saw him approaching on a motor cycle in a zigzag manner and suspected that he had no licence, as accused also had difficulty in changing gear. The rider passed them and failed to stop although shouted at and the Sergeant